

TENNESSEE ETHICS COMMISSION

Minutes of December 12, 2006

Pursuant to the call of Chairman Thomas J. Garland, the Tennessee Ethics Commission ("Commission") met on Tuesday, December 12, 2006, at 12:15 p.m. in the auditorium of the Nashville Public Library.

The following members were present:

Thomas J. Garland, Chair

R. Larry Brown

Donald J. Hall

Linda W. Knight

Dianne F. Neal

Chairman Garland called the meeting to order and stated that Commissioner Benjamin S. Purser, Jr. would arrive in approximately 15 minutes. He also stated that the agenda items would be taken out of order and the advisory opinions would be discussed last.

Commissioner Neal suggested a change in the minutes of the October 31, 2006 Public Rules Hearing regarding Ms. Carr's comments. Commissioner Neal requested to change the language from "...ethics meetings" to "...legislative committee meetings while the Governmental Reform Act was being drafted." Commissioner Knight also suggested correcting the spelling of Allan Ramsaur's name in the public hearing minutes. Commissioner Hall made the motion to approve the minutes of the October 31, 2006 Commission meeting and the Public Rules Hearing with the two new revisions. Commissioner Knight seconded the motion.

The motion was unanimously approved.

Chairman Garland recognized Mr. Bruce Androphy, the Commission's Executive Director.

Mr. Androphy provided information regarding the current registration status of lobbyists and employers of lobbyists. He announced that 417 lobbyists have registered and \$304,500 in registration fees have been collected. He also stated that warning letters were sent out to those employers of lobbyists and lobbyists who have not registered or have not paid the registration fee. He also announced that currently there were three lobbyists who have registered but have not paid their registration fees, one unregistered lobbyist, 21 employers who have not registered, and nine employers who have registered but have not yet paid their registration fees. Mr. Androphy stated that civil assessment letters will be sent to these individuals and employers if the issues were not rectified.

Commissioner Hall asked Mr. Androphy what the primary basis for non-compliance has been thus far. Mr. Androphy suggested that most non-compliance has been a result of miscommunication between employers of lobbyists and lobbyists.

Mr. Androphy then discussed the website and ethics training. He stated that the new format for the Commission website was available online on December 6, 2006 and that training sessions have been conducted for a variety of groups. He announced that both Houses and the Executive Chamber have been involved in scheduling upcoming training sessions. Mr. Androphy also stated that an educational insert concerning the Commission will be put in the payroll envelopes of state employees on January 15, 2007.

Mr. Androphy informed the Commission that the move to the SunTrust Building has been delayed until December 29, 2006.

Mr. Androphy stated that initial efforts have been made to implement filing of the disclosure statements that are required to be filed by local elected officials. He announced that this is a quite an endeavor given that the local officials were previously required to file locally but now are required to file with the Commission. The number of local officials required to file was estimated to be in a range of 12 – 14, 000 people and they will be required to file by January 31, 2007. He also announced that General Assembly members will be required to file their disclosure statements by April 15, 2007. He stated that the staff has been working with the Municipal Technical Advisory Service, the County Technical Assistance Service and has communicated with Brook Thompson's office to inform the local officials of their filing requirements. He also reported that the staff has been working on a database for recording the information and that the local officials may now download the form from the Commissions' website.

Mr. Androphy announced that he had discussions with the Governor's office regarding the three executive orders which were enacted to address ethics and financial disclosure. He stated that, because some officials are now required to file two disclosure statements, there is a possibility the Governor may choose to fold the orders into the jurisdiction of the Commission.

Mr. Androphy stated that he has spoken to many members of the General Assembly who have shown support for clean-up legislation of the Comprehensive Governmental Ethics Reform Act of 2006 in order to better exemplify the intent of the Act. Mr. Androphy provided three items for legislative clean-up consideration: Requiring employers of lobbyists, such as CEOs, and CFOs, to attend ethics training; expanding the definition of immediate family to include parents and adult children; and adding the Executive Director of the Commission to the list of those who must file a Disclosure of Interest form. He also stated that some lobbyists have requested moving the registration date from October 1st of each year to January 1st of each year. Mr. Androphy stated that he has no objection to this request and that it is an item for the Commission's consideration.

Commissioner Knight suggested reviewing earlier Commission meeting minutes to find other proposals that have been discussed for amending the statute. Commissioner Knight also stated that she was not opposed to Mr. Androphy's first suggestion for amending the legislation if the training for employers can be performed in a way that does not cause

thousands of people to take time off from their work to attend the courses. She also inquired as to whether all employers are given an ethics handbook. Commissioner Knight did not agree with the second suggestion for adding parents and adult children to the definition of immediate family. She believes this addition is too intrusive, especially if these family members do not live in the same household. Commissioner Knight did agree with the third suggestion to require the Executive Director of the Commission to be required to file a disclosure of interest form.

Commissioner Hall agreed with Commissioner Knight that the definition of immediate family should not include parents and adult children.

Commissioner Neal stated that the adult children concept may already be defined too broadly to be included in the definition of immediate family. She suggested some legal research should be done to assess whether this determination has already been made by a court under campaign finance law.

Commissioner Brown added that it is already difficult to get people involved in public service and the expansion of the definition of immediate family may make it even more difficult. He also suggested that the intent for training employers was good; however, he believes there should be a distinction made between large companies and small companies. He suggested that, in large companies, the CEOs and the CFOs may not actually be the individuals responsible for employing the lobbyist. Mr. Androphy stated that the reason for selecting the CEOs and the CFOs for the training courses was because these individuals were specifically required to be identified on the registration form by the legislation. Commissioner Knight stated that currently the Commission does not have enough information to know if employers are going to fail to comply. She does not believe training for these company officials would be feasible at this time. Commissioner Brown suggested a compromise to allow the employer ethics training to be on a voluntary basis. Chairman Garland also had concerns with the first suggestion for training employers. He stated that more discussion should be made before presentation is made to the General Assembly.

Commissioner Neal commented that all agree only on the third suggestion to have the Executive Director file a disclosure statement.

Speaker Mark Greene addressed the Commission regarding the delivery of the manual to employers. He wants to explore other possible options for delivery. Mr. Androphy stated that this issue would be addressed in the proposed rules.

Mr. Androphy moved for the authorization to proceed with the electronic filing of the Statement of Disclosure of Interest Form by April 15, 2007 for General Assembly Members, the Governor, the Governor's Cabinet, and Constitutional Officers. This group was approximated to be 415 people.

The motion was unanimously approved.

Mr. Androphy moved for approval to send out civil assessment letters to those that have not complied with the registration process.
The motion was unanimously approved.

Next, Mr. Androphy began discussion of the Ethics Commission's Proposed Rules. Legal Counsel, Anne Turner discussed the process for adopting the Ethics Proposed Rules. She stated that if the rules were adopted today, they would be sent to the Attorney General for final approval. If no changes are made, then the rules would go to the Secretary of State for filing. She stated if any changes were made the rules would be sent back to the Commission members. Commissioner Brown asked Mr. Androphy if there were any other rules issues that needed to be discussed. Mr. Androphy did not have any further items for discussion on the rules.

Commissioner Brown made a motion to approve the Rules.
The motion was unanimously approved.

Mr. Androphy also provided the Commission with an item listed in the agenda pertaining to job descriptions and staffing information. He stated that the descriptions were derived with the assistance of the Personnel Director with the Secretary of State's office and he was pleased with the final descriptions.

Mr. Androphy raised the issue, discussed in a memorandum, that pertains to membership associations, such as the Chamber of Commerce, and whether the members of these associations or organizations should be required to register as employers of lobbyists. Commissioner Knight responded that, at the present time, members of organizations that hire lobbyists are not required to register as employers of lobbyists. Mr. Androphy stated that the purpose of raising the issue was to discuss whether this is a desirable result.

Speaker Mr. Allan Ramsaur stated that he does not believe members of these associations should be required to register as employers of lobbyists. Speaker Mr. Mark Greene also stated that this would be an impractical requirement for these association members to register.

Commissioner Brown asked for clarification regarding the gift prohibitions and association members. Commissioner Hall stated that the current statute does not include these types of organizations as employers of lobbyists. He agreed with the last paragraph of the memorandum that if it becomes apparent in time that this issue needs to be revisited, the legislature could change the statute to address the concerns. Commissioner Neal agreed with Commissioner Hall and she stated that there is nothing that prevents an agency from imposing its own ethics rules. She recommended that the Commission propose action to the General Assembly if it becomes apparent in the future that it becomes necessary. Commissioner Knight opined that the legislature struck a balance without going so far that the law would be too massive to contemplate implementing. Commissioner Brown stated that he believes there are probably already codes of conduct that prohibits these types of gifts. Mr. Androphy reminded the Commission that issues such as this are presented to make the Commission aware of possible concerns.

Next, Mr. Androphy stated that he and Anne Turner recently returned from The Council on Government Ethics Law Conference in New Orleans and announced that the conference will be held in Nashville, Tennessee in 2010.

Commissioner Benjamin S. Purser, Jr. joined the meeting.

Mr. Androphy opened discussion on two advisory opinions. The Advisory Opinion 06-01 draft regarding the point in time for lobbyists to register was first discussed.

Commissioner Knight proposed a different conclusion from the draft. She suggested adding language in the Opinion that addresses the scenario in which a lobbying agreement is formed in one registration year but the lobbyist will not lobby until the following year. She suggested a reservation or an exclusion for this issue. Mr. Androphy stated that he would like to wait until there is an actual factual scenario regarding this issue. Commissioner Hall stated that he would prefer to add language suggested by Commissioner Knight that reserves the issue for future determination. Commissioner Neal suggested that the Opinion should only answer the questions posed by Dick Lodge in his advisory opinion request. Commissioner Brown opined that under the current statute there is an interpretation that can be made that a lobbyist becomes a lobbyist at the point of time when the employment agreement is made, regardless of when the actual lobbying begins. Chairman Garland reminded the Commission members that in a previous meeting Assistant Attorney General Janet Kleinfelter recommended to only respond to the actual questions presented in the advisory requests.

Commissioner Neal moved to adopt Advisory Opinion 06-01 in its original form. Commissioner Brown seconded the motion.

Four members voted in the affirmative: Chairman Garland, Commissioner Neal, Commissioner Purser, and Commissioner Brown.

Two members voted in the negative: Commissioner Knight and Commissioner Hall.
The motion passed.

Mr. Androphy moved the discussion to the Advisory Opinion 06-03 draft regarding monitoring legislation and rulemaking activities and how these actions relate to the definition of lobbying.

Commissioner Knight suggested to correct language in the second paragraph of the Opinion from “the act construes lobbying as communication”, to “the act defines lobbying as communication.” She suggested other changes to correct English language errors. She also had reaffirmed her concerns regarding the portion of the conclusion related to “entering into an agreement.”

Commissioner Hall had concerns regarding the language in Footnote 4. He stated that he does not disagree with the sentiment of the language; however, he believes it goes beyond the scope of the request. Speaker Allan Ramsaur suggested changing the language in the conclusion from “must register” to “might be required to register.” After

more discussion, the language in the conclusion was changed to "...unless another exception to the registration requirements applies." Commissioner Purser corrected one final typo error in the footnote.

A motion was made to accept Advisory Opinion 06-03 with the suggested changes.

The motion was unanimously approved.

Mr. Androphy suggested a break for all members to read the proposed changes to Advisory Opinion 06-02.

Chairman Garland adjourned the meeting for a ten minute break at 1:27 p.m.

Chairman Garland reconvened the meeting at 1:49 p.m.

Mr. Androphy began discussion regarding Advisory Opinion 06-02 that involves the issue of when attorneys must register as lobbyists. Mr. Androphy stated that he agreed with the stylistic changes suggested by Commissioner Knight.

Commissioner Knight suggested including the definition of "legislative action" on page 3 of the Opinion. She stated that the definition would be useful but not essential.

Mr. Androphy did not agree with adding the definition because he felt it would not be necessary for answering the questions presented in the Opinion. Mr. Androphy agreed with Commissioner Knight's suggestion to add a footnote to page three that states "The definition of "legislative action" is not germane to the Opinion."

Commissioner Knight suggested deleting two phrases on page 3. This first phrase was, "This opinion relates solely to executive branch communication" and the second phrase was, "Attorneys communicating with officials in the legislative branch for the purpose of influencing are lobbying and must register" because these phrases were not precisely correct. After discussion, the sentence on page 3 was decided to read, "Note, however, that this particular exclusion applies solely to communications with an "an official of the *executive* branch." The second phrase was deleted from the draft.

Commissioner Knight proposed to delete the sentence on page 4 that states, "Instead the legislature clearly intended to exempt only communications typically associated with licensed legal representation before a tribunal regarding a specific legal action by or against the client. See, for example, the definition of the practice of law contained in T.C.A. § 23-3-301." She stated that this wording should be deleted because this exception applies solely to attorneys; however, there are other exceptions that are available to attorneys and non-attorneys. After discussion, the "practice of law" definition was excluded. Also, Commissioner Knight suggested changing the language from "four types of communication" to "several types of communication" and this change was also adopted.

Under "Policy Considerations" on page 5, Mr. Androphy referred Commissioner Knight to a block of text she suggested should be deleted. She stated that she wanted the

language removed because there are other exceptions for attorneys who will not have to register as lobbyists other than the exception described under T.C.A. § 3-6-301(15). After discussion, Mr. Androphy and Commissioner Knight agreed to change the language to show that the specified guidelines would be explicitly described for that particular exception only.

Commissioner Knight requested that the Opinion clarify that it does not address the ordinary and routine permitting, licensing or compliance decision by an official of the executive branch exception. This exception is found in the definition of “administrative action” in T.C.A. §3-6-301(1). Mr. Androphy and all Commissioners agreed with this clarification and decided to address this issue in a future opinion.

Mr. Androphy suggested removing the first sentence in the second paragraph on page 6 and instead beginning the paragraph with the sentence that begins with, “Therefore, because contested case actions...” All Commissioners agreed to the change.

Next, discussion was moved to the “Responses to Questions” section in the Opinion.

Speaker Dan Elrod, who represents the Tennessee Society of Certified Public Accountants, stated that he is concerned about the unintended consequences of the way Question #1 is addressed. He suggested that an initial determination should be made in this question and in others whether the act is actually lobbying, even before the determination is made whether the attorney exception applies.

Speaker Allan Ramseur agreed with Dan Elrod’s approach with answering the first question. He also suggested utilizing the approach to simply answer the questions posed without side discussion, thereby using a similar approach as the courts.

Commissioner Hall suggested that the questions should be answered with some explanation for the public to understand how the answer was derived.

Speaker Courtney Pearre opined that if you only address the attorney lobbying exception, then the inference is the activity described is actual lobbying. He wants to have clear language to address whether the activity itself is lobbying before any exceptions are discussed.

Commissioner Knight and Mr. Androphy agreed that this Opinion does not answer the question as to whether activity related to appearing at an informal taxpayer conference described in Mr. Trost’s request is defined as “routine permitting” or if the activity falls under the definition of “lobbying” for those that are not attorneys. There was agreement that explicit language should be added to the Opinion to clarify this limitation.

Commissioner Knight suggested that perhaps evidence may be taken in the future to determine exactly how common and routine these types of activities really are in the real world.

More discussion was held between Commissioner Knight and Mr. Androphy regarding the changing of the language in some of the footnotes in the Opinion. Commissioner Brown also suggested ideas to limit a listing of items that were not considered in the Opinion.

Commissioner Hall referred the panel to page 4. He suggested putting language in the Opinion to show instances of non-lobbying conduct. Mr. Androphy agreed with Commissioner Hall.

Commissioner Knight stated that on page 4 sentences should be added that state the effect, "This Opinion does not address at this time Item 2 above. Under Item 2, "administrative action" does not include "ordinary and routine permitting, licensing, or compliance decisions by an official of the executive branch of state government."

Mr. Androphy reviewed the discussed changes to Advisory Opinion 06-02 with the Commission.

Commissioner Knight suggested an Appendix to be referenced in the body of the Opinion. Mr. Androphy suggested the reference to the Appendix should be placed on page 2.

Commissioner Hall made a motion to approve Advisory Opinion 06-02 with the understanding that copies of the final version would be circulated for review. Mr. Androphy suggested that if he did not get a response from any of the Commissioners within 72 hours, he would assume there would be no further changes to the Opinion.

Chairman Garland recognized Speaker Allan Ramsaur.

Mr. Ramsaur wanted to verify that a letter he sent the Commission on Friday, December 8, 2006 was made part of the record. He also voiced his concerns regarding the Open Meetings Act and the Public Records Act. He opined that it is a violation of the Open Meetings Act for drafts to be circulated without the public's ability to view them. He believes that there have been indications that previous drafts of the opinions have been circulated and other communications have taken place between the staff and the Commission and between Commissioners regarding the opinions. Mr. Ramsaur stated that Mr. Androphy has not stated that the communications have not taken place, only that the communications are privileged. Therefore, Mr. Ramsaur believes taking action on the opinions today would be in violation of the Open Meetings Act. Further, Mr. Ramsaur stated his concerns regarding the Public Records Act. He does not agree that there is a "deliberative process privilege" under Tennessee law. He also had concerns that the second advisory opinion is too broad and provides more than is necessary to answer the posed questions in the request for the advisory opinion.

Mr. Androphy responded to Mr. Ramsaur's concerns. Mr. Androphy stated that he has not asserted that there is a privilege. He stated that, as in his response to Mr. Ramsaur's

letter, he is gathering the information for the Attorney General's office to analyze to determine if the items are subject to privilege. Mr. Androphy confirmed that if the items are determined to not be subject to a privilege, then the items would absolutely be shared. Mr. Androphy also stated that, if the Attorney General's office does determine there is a privilege, then the question should be resolved whether the Commission seeks to waive that privilege, or if the Commission authorizes him to waive the privilege.

Mr. Ramsaur reasserted his position that the Commission should not take action on the opinions until the Attorney General responds.

Commissioner Knight and Commissioner Neal both had additional questions for Mr. Ramsaur about the assertions of his argument.

Commissioner Hall asked Mr. Ramsaur if he believes today's meeting was not done in an open manner. Commissioner Hall reaffirmed that the meeting was conducted in a very engaging, constructive way and the Commission invited comments from various speakers throughout the meeting.

Chairman Garland asked Mr. Androphy how long the revision of the draft has been posted on the website. Mr. Androphy stated that the draft has been on the Commission's website since November 27, 2006 and that he notified Mr. Ramsaur when the draft was actually posted.

Chairman Garland addressed Mr. Ramsaur's concerns. He stated that he believes the Commission has acted as openly and fairly as possible.

Mr. Ramsaur clarified that he did not take issue with the openness and fairness of the Commission. He stated that he takes issue with the compliance of the Commission with the Open Meetings Act and the Public Records Act.

Commissioner Neal stated that the statute does not require the Commission to render advisory opinions to a lobbyist only after a lobbyist guided us to that decision. She opined that lobbyists in the past have had enormous influence on legislation and that activity was one of the reasons the Commission was formed. She also stated that she believes that the Commissioners have done more than is required to deliberate the advisory opinions by permitting questions and comments, which is discretionary on the part of the Commission. She stated that she does wish to continue having comments in the future.

Commissioner Neal also affirmed her trust in Chairman Garland and his desire to have openness and cooperation by the Commission.

Mr. Androphy stated that he has posted such items as the agenda, advisory opinion drafts, minutes, and other postings on the website for public viewing. He believes the

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Commission has gone beyond what the law requires. He also referred to the openness of the deliberations of the October 31 meeting, as well as to the meeting today.

Commissioner Purser made the motion for the Commission to affirm their previous action to accept Advisory Opinion 06-02 with a caveat that there will be a final review period of 72 hours for the Commissioners to respond with any changes. The motion was unanimously approved.

Mr. Androphy stated that the next Commission meeting will be February 15th at 9:00 a.m. The location of the next meeting will be determined.

Chairman Garland adjourned the meeting at 3:41 p.m.

Respectfully Submitted,

Melinda R. Arrington
January 24, 2007